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No. 94-7427

In The

Supreme Court of the United States

October Term, 1995

JOSEPH V. LIBRETTI, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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Julius Goebel and T. Raymond Naughton, *Law Enforcement in Colonial New York* (1944) 13

I Frederick Pollack and Frederick Maitland, *The History of English Law* (2d ed. 1923) 14

5 J. Moore, *Federal Practice* (2d ed. 1995) 16

2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* (1992) 15

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I. RULE 11(f) REQUIRES THE DISTRICT COURT TO SATISFY ITSELF THAT THERE IS A FACTUAL BASIS FOR THE FORFEITURE PART OF A GUILTY PLEA

Petitioner's opening brief showed that the Federal Rules of Criminal Procedure treat criminal forfeiture as a substantive charge, and that Rule 11(f) requires the court to satisfy itself that there is a factual basis for a defendant's plea to criminal forfeiture charged in an indictment or information.

1. In response, the government seeks to recharacterize this part of petitioner's plea as nothing more than a sentencing stipulation. In the government's view, paragraph 10 of petitioner's plea agreement "is best understood as petitioner's stipulation that all of the property

he owned met the requirements for forfeiture under 21 U.S.C. 853." U.S. Br. 31.

Neither the Sentencing Guidelines nor the text of the plea agreement support the government's contention that paragraph 10 should be characterized as a sentencing "stipulation." The Guidelines provide that a plea agreement may be accompanied by "a written *stipulation of facts* relevant to sentencing." U.S.S.G. § 6B1.4(a) (emphasis added). Paragraph 10 of the plea agreement, which states that petitioner "agrees to transfer [to the government] his right, title and interest in all of his assets," does not establish any *facts* that are relevant to sentencing. As noted in his opening brief, petitioner contests the effect of paragraph 10.[1] Assuming that it operates as concession of forfeitability, it is analogous to a concession of guilt, not a sentencing stipulation. The court of appeals interpreted paragraph 10, like a guilty plea, to state an ultimate legal conclusion, not to stipulate one or more of the subsidiary facts that might bear on the correct sentence.

Moreover, the government's characterization of forfeiture as exclusively a matter of sentencing finds no support in the laws governing the calculation and imposition of sentences, for these laws make no provision for

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[1] The government's characterization of paragraph 10 ignores two other paragraphs of the plea agreement, which cast it in quite a different light. *See* Pet. Br. 23-24 (discussing paragraphs 2 and 9, as well as the district court's ambiguous and misleading statements at the Rule 11 hearing). Although the court of appeals did conclude that petitioner intended to forfeit all of his property without any further proceedings, it should be noted that the district court made no findings concerning petitioner's intent, and no record was developed on this point. Petitioner contends that he understood the agreement to provide for further findings to determine which assets were subject to forfeiture. *See* Pet. Br. 24-25. In any event, neither court below made any finding that petitioner intended to stipulate that his property "met the requirements" of Section 853.

criminal forfeiture. The Sentencing Guidelines simply provide that other laws govern forfeiture procedures, stating that "[f]orfeiture is to be imposed upon a convicted defendant *as provided by statute*." U.S.S.G. § 5E1.4 (emphasis added). The existing sentencing procedures contain no mechanism to assemble information regarding criminal forfeiture. Information relevant to sentencing is assembled by the presentence investigation and report. The content of the presentence investigation report is governed by Rule 32(b)(4) of the Federal Rules of Criminal Procedure, which develops only the facts necessary for Guidelines sentencing and restitution.[2] Rule 32(b)(4) neither mentions forfeiture nor authorizes an inquiry into the facts necessary to determine the propriety of forfeiture, such as the proceeds of the offense and property derived from those proceeds, the property used to facilitate the offense, and any basis for forfeiting substitute assets.

The rationale for omitting forfeiture from the sentencing laws and procedures becomes clear upon review of the Federal Rules regulating criminal forfeiture, which require forfeiture to be treated as a substantive charge rather than a mere matter of sentencing. Rule 7(c)(2) of the Federal Rules of Criminal Procedure requires that criminal forfeiture be alleged in the indictment. There is, of course, no similar requirement for matters relevant to sentencing. Rule 31(e) requires a special jury verdict on

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[2] Fed. R. Crim. P. 32(b)(4) provides that the report of the presentence investigation shall contain 1) information concerning the defendant's history and characteristics (including prior criminal history and financial information pertinent to his ability to pay a fine or restitution); 2) the Guidelines classification of the defendant and the offense and the suggested sentencing range; 3) any pertinent policy statements issued by the Sentencing Commission; 4) information regarding the impact of the offense on any victims; 5) information regarding relevant non-prison programs and resources; and 6) other information required by the court.

the issue of forfeiture. Sentencing matters, in contrast, are determined by the judge, not the jury.[3] Rule 32(d) provides for a judgment of forfeiture. Sentencing matters, such as the amount of a drug involved in a transaction, are not embodied in the judgment.

The contrast between the procedural rules governing forfeiture and those governing sentencing is not accidental. To the contrary, the draftsmen of the Federal Rules rejected a proposal to treat criminal forfeiture as a matter of sentencing, adopting instead Rules 7(c)(2), 31(e), and 32(d). *See* Pet. Br. 16-19. The government's arguments would have been correct if the alternative proposal had been adopted, but it was not.

2. Despite the government's suggestions to the contrary, petitioner's argument fits squarely within the language of Rule 11(f). Rule 11(f) requires a factual basis for the defendant's "plea," and the terms of any plea must be determined by reference to the charges against the defendant as stated in the indictment, and by the laws that determine what must be alleged in the indictment and proved at trial. For example, use of a firearm in the commission of an offense may be defined as an element of the offense that must be alleged in the indictment, proved at trial, and for which there must be a factual basis, or it may be defined by the legislature as a matter merely for sentencing. *See McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986) (although "many legislatures have made possession of a weapon an element of various

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[3] *See* 28 U.S.C. § 994(a)(1) (1988) (Sentencing Commission to promulgate guidelines for use of sentencing court); U.S.S.G., Ch. 1, Pt. A, intro. comment (court must select sentence within guidelines range, but may depart outside the prescribed range if case presents atypical features). In capital cases, however, jury sentencing is authorized. 18 U.S.C. § 3593(b) (capital sentencing hearing to be conducted before jury unless defendant moves for hearing before court and government consents). For a discussion of the jury's function in death penalty cases, see *infra* p. 17.

aggravated offenses," Pennsylvania statute treats possession as a sentencing factor which need not be proved beyond a reasonable doubt or tried by jury). Similarly, the legislature's treatment of criminal forfeiture determines whether it must be treated as a substantive charge or merely a matter of sentencing. By enacting rules requiring that forfeiture be charged in the indictment, proved to the jury, and embodied in the judgment, Congress defined forfeiture as a substantive charge, not merely a matter of sentencing. The absence of any provision for forfeiture in the sentencing laws and procedures confirms the conclusion that Congress intended to treat forfeiture as a substantive charge.

Criminal forfeiture is unquestionably a procedural oddity. It is, of course, ultimately a criminal punishment and a part of the defendant's sentence. But under the Federal Rules of Criminal Procedure forfeiture is, nonetheless, treated as a substantive charge that must be included in the indictment and submitted to the jury. As such, forfeiture is also properly a matter to which the defendant must plead, and for which a factual basis must be established. As explained in a Senate report that accompanied amendments to the RICO and CCE forfeiture provisions and new forfeiture provisions applicable to other drug offenses, federal criminal forfeiture "is an *in personam* proceeding against the defendant in a criminal case *and* is imposed as a sanction against the defendant upon his conviction." S. Rep. No. 225, 98th Cong., 1st Sess. 193 (1983) (emphasis added). While the government's brief (U.S. Br. 28) emphasizes the last part of this sentence, it ignores the first part, which recognizes that criminal forfeiture is a separate "*in personam* proceeding" or charge against the defendant within the criminal case. *Id.*

The government's reliance on selected passages of legislative history and statutory text (*see* U.S. Br. 20-21, 28) implicitly recognizes that this Court must look outside Rule 11 to answer the question whether Congress has treated criminal forfeiture as a substantive charge or

as a matter of sentencing. The material cited by the government is not on point, however, for none of it addresses the proper treatment of criminal forfeiture for procedural purposes, and none of it is inconsistent with the position petitioner advances. The only provisions that characterize forfeiture for procedural purposes are Rules 7(c)(2), 31(e), and 32 of the Federal Rules of Criminal Procedure, and these rules require criminal forfeiture to be treated as a substantive charge. Indeed, one of the Congressional reports upon which the government relies endorsed the procedural requirements of the Federal Rules, demonstrating that Congress intended these rules to govern and saw no inconsistency between forfeiture's punitive character and the requirement that it be treated as a substantive charge for procedural purposes.[4]

Petitioner's interpretation of Rule 11(f) is also consistent with this Court's prior decisions and the legislative history of the rule. Although this Court's decision in *McCarthy v. United States*, 394 U.S. 459 (1969), describes the factual basis requirement of Rule 11 without mentioning forfeiture, the appropriate treatment of forfeiture was never an issue in that case because it was decided before the 1970 legislation authorizing forfeiture. Similarly, the Advisory Committee Note cited by the government (U.S. Br. 16-17) was drafted four years before the landmark forfeiture legislation. Though this Note does not mention forfeiture, it does indicate that the district court is to find

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[4] The report states:

> Criminal forfeiture must be alleged in the information or indictment. If the defendant is found guilty of the underlying offense, then a special verdict must be returned with respect to the forfeiture allegations and a judgment of forfeiture is entered against the defendant. Only then is the government authorized to seize the property.

S. Rep. No. 225, 98th Cong., 1st Sess. 193-94 (1983) (footnote citing Fed. R. Crim. P. 31(e) and 32 omitted), *cited in* U.S. Br. 21, 28.

a factual basis for the charge or charges to which the defendant pleads. Once Congress altered the definition of the charge that must be included in the indictment and proved by the government as part of the case it must present to the jury, the definition of the plea necessary to resolve the case followed suit, encompassing forfeiture. Since the scope of the factual basis requirement turns on the nature of the charge and the corresponding plea, it too now encompasses forfeiture.

3. The government responds to petitioner's argument that forfeiture is subject to abuse by arguing (U.S. Br. 29) that "any potential for abuse of forfeiture authority should be addressed through case-by-case inquiry into actual overreaching, not through the formulation of broad prophylactic rules." Petitioner agrees. The factual basis determination is just such a case-by-case inquiry, wholly unlike the broad prophylactic remedy at issue in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), where the defense sought an absolute prohibition on the forfeiture of funds that might be used to pay defense counsel. The factual basis requirement will provide the court with information necessary to ensure that the government has not exceeded its statutory forfeiture authority. It will also provide information necessary to ensure that the defendant understands the scope of the forfeiture being sought and the facts necessary to support that forfeiture, and knowingly and voluntarily agrees to the forfeiture under those conditions. *See* Pet. Br. 14-15.

The government has suggested no alternative that would provide the necessary safeguard against government overreaching or simple mistake. As noted above, the government contends that paragraph 10 of petitioner's plea agreement forfeited all of his property (including legitimately obtained property) and was an appropriate stipulation concerning a sentencing matter. In the absence of a factual basis inquiry, there will be no mechanism for determining whether there is a factual foundation for such agreements. The government notes (U.S. Br. 32) that the court is not bound by stipulations,

but may determine the facts relevant to sentencing with the aid of the presentence report. However, as discussed above, *supra* p. 3, the presentence report does not address the questions upon which forfeiture turns.

This case illustrates the absence of any mechanism for determining the factual basis for criminal forfeiture if it is treated merely as a part of sentencing. The presentence report in this case did not address the factual predicates for forfeiture: it did not identify particular property as proceeds or derived from proceeds; it did not identify property used to facilitate the offense; it did not calculate the total proceeds; and it did not identify a factual basis for treating other property as substitute assets. The transcripts from the Rule 11 and sentencing hearings give no indication that the district court sought to identify the facts supporting forfeiture. The evidence relied upon by the government in support of its claim that a factual basis indeed exists (U.S. Br. 33) was introduced *after* sentencing at the ancillary third-party hearing, including the first and only evidence of the government's calculation of the total "proceeds" petitioner derived and the rationale for the forfeiture of legitimately obtained as well as tainted property. The government's brief glosses over the fact that after hearing this additional evidence the district court ruled that further evidentiary proceedings would be necessary to support the forfeiture order in the plea agreement, since the "[f]orfeiture statutes do not mandate forfeiture of property purchased with legitimate funds." J.A. 309. The district court also found the existing evidence insufficient to support the government's substitute assets theory, observing that the government had presented no more than unsubstantiated suspicions. J.A. 289 ("You might suspect that, but can you proove [sic] it?").

4. The government's contention (U.S. Br. 36) that a factual basis inquiry is an "inapt method of revealing hidden misunderstandings between the parties" is squarely inconsistent with the Advisory Committee Note that accompanied the adoption of the factual basis requirement. In a passage upon which the government

itself relies in an earlier portion of its brief (U.S. Br. 16), the Note explains that the factual basis inquiry is intended to "e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." 18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment. In other words, the factual basis requirement will make clear when a defendant is pleading guilty because of such a misunderstanding. Moreover, the introductory signal "e.g." indicates that the factual basis requirement is intended to bring to light other forms of misunderstanding as well.

The Advisory Committee and Congress did not accept the government's argument that any judicial inquiry into the facts underlying the plea agreement would defeat the very purpose of such agreements, which the government says is to "relieve the litigants of the need to persuade the court that the stipulated facts are true." U.S. Br. 36. The factual basis requirement reflects the view that if the parties cannot identify any factual support for their plea agreement at the Rule 11 hearing, the defendant's plea is likely the result of some fundamental misunderstanding which should be brought to light. That insight applies equally to a defendant's admission that he committed an offense charged in the indictment and to his admission that property named in the indictment is subject to forfeiture.

Petitioner's opening brief describes how such a fundamental misunderstanding occurred in his own case. Pet. Br. 21-25. The government responds that a genuine mistake would have been raised promptly in the district court, and, further, that the court of appeals made "a detailed examination of the record" and found there was no misunderstanding. U.S. Br. 36. The problem with the government's argument is that one cannot raise a misunderstanding of which he is not yet aware. For precisely this reason, Rule 11(f) requires an inquiry by the court in order to flush out such latent misunderstandings.

In petitioner's case, there was no point prior to the sentencing hearing when any misunderstanding concerning forfeiture would naturally have come to light. It was only at the end of the sentencing hearing, after the judge stated the proceedings were at an end, that it became evident there would be no hearing on the issue of forfeiture. At that point petitioner objected that there was no factual support for the forfeiture of all of his property. J.A. 154. Since petitioner raised this objection pro se on the spur of the moment, it is unrealistic to fault him, as the government does (U.S. Br. 36), for failing to describe his objection more fully. Moreover, since petitioner was given no opportunity to develop a record supporting this claim, and the district court made no findings on the issue of petitioner's intent, the court of appeals was in no position to make its own findings regarding petitioner's intentions. Petitioner's case thus demonstrates the need for a mechanism to bring to light in the district court fundamental misunderstandings regarding the forfeiture portion of plea agreements. A factual basis inquiry would have required a description of the property to be forfeited and a brief explanation why it was forfeitable, providing a natural point at which any difference in understanding between petitioner and the prosecution would be evident.

5. Forfeiture, unlike any other aspect of sentencing, has a direct impact upon the property rights of third parties. The government's brief gives scant attention to the interests of third parties, brushing them aside with the comment that they are adequately protected by the ancillary third-party procedures under 21 U.S.C. § 853(n). U.S. Br. 34-35. However, as petitioner has shown (Pet. Br. 34-39), the procedures deemed adequate by the government provide no relief for some innocent owners whose rights may be extinguished by forfeiture pursuant to a plea agreement. The government's interpretation of Rule 11(f) permits the property rights of third parties to be disturbed without even the minimum safeguard of a factual basis showing. The government's brief contains no reply to the evidence (Pet. Br. 39) that Congress

restricted the procedural protections afforded to third parties in the ancillary hearings in reliance on the firm evidentiary basis for forfeiture that would be required before conviction.

The government relies heavily (U.S. Br. 32) on "the usual premise of an adversary system . . . that stipulations to which the parties agree are presumptively valid." Because that presumption focuses exclusively on the parties who made the stipulation, it takes no account of the interests of third parties and provides no justification for allowing their rights to be adversely affected when no factual basis has been shown. *See* Pet. Br. 34-35 (defendants have no incentive to protect the property rights of third parties). The rights of third parties provide an additional reason why Congress did not treat forfeiture as merely a matter of sentencing.

6. The government relies upon a substitute assets theory to justify the forfeiture in this case, but a vital element is missing from this discussion. The government contends (U.S. Br. 33-34) that it was entitled to forfeit substitute assets in the amount of one million dollars because a state agent had estimated that petitioner had earned at least one million dollars from drug trafficking. The district court correctly rejected this argument at the third-party hearing, because the government did not meet one of the statutory prerequisites for the forfeiture of substitute assets.

Section 853 establishes a two-part test for forfeiture of substitute assets. First, the government must identify forfeitable property under Section 853(a), which reaches, *inter alia*, the "proceeds" of drug trafficking. If the government wishes to forfeit substitute assets, rather than the proceeds themselves, it must also demonstrate that it has satisfied at least one of five additional criteria described in 21 U.S.C. § 853(p)(1)-(5). In the district court, the government's substitute assets claim failed at this second step, when the district court rejected as unproven speculation the government's claim that petitioner had secreted proceeds. J.A. 289. The government's brief does

not address this deficiency. It treats evidence concerning proceeds as a sufficient basis for the forfeiture of substitute assets, despite the requirements of 21 U.S.C. § 853(p)(1)-(5). Adoption of the government's arguments would radically expand the reach of Section 853(p), transforming it into authority permitting forfeiture of estate. Congress clearly did not authorize forfeiture of estate. *See* Pet. Br. 29-31.

7. At bottom, the government's argument is that petitioner accepted this bargain and should not now be heard to complain. *See* U.S. Br. 36-37, 49. This argument ignores the statutory – and ultimately constitutional – limitations on the plea agreements into which the government may enter. It is well established that a plea agreement cannot confer upon the sentencing court authority to impose an illegal sentence. *See, e.g., United States v. Snider*, 957 F.2d 703, 707 (9th Cir. 1992) (per curiam) ("plea agreements do not provide authority for a sentencing court to impose punishment in excess of the maximum provided by statute"); *United States v. Guardino*, 972 F.2d 682, 687-88 (6th Cir. 1992); *United States v. Rice*, 954 F.2d 40, 43 (2d Cir. 1992) ("a plea agreement obviously could not authorize a judge to impose whatever punishment the government and the defendant agreed to"). As the court of appeals recognized in *United States v. Snider*, 957 F.2d at 706-07, the proposition that " 'a deal is a deal' " may govern civil agreements, but it cannot authorize the court to impose a criminal sentence for which there is no statutory authorization. Adherence to that principle in the context of forfeiture is critical, because the government's financial needs may predispose it to abuse its authority. Rule 11(f)'s factual basis requirement provides the only mechanism that can prevent the government from exceeding the statutory limitations on forfeiture in guilty plea cases.

II. THE RIGHT TO A JURY DETERMINATION OF CRIMINAL FORFEITURE CAN BE EXTINGUISHED ONLY BY A KNOWING AND INTELLIGENT WAIVER

1. Petitioner's opening brief demonstrates the uniform English and colonial practice of submitting the issue of criminal forfeiture to the jury, and that this historic practice is embraced in the Sixth Amendment. Pet. Br. 42-44. The government seeks to minimize the importance of the historic record, arguing (U.S. Br. 40) that the jury's "limited role was to determine what assets the defendant owned," and that this "modest function" was not deemed a fundamental right of the defendant. The only authority the government cites in support of this argument is a brief passage in a student note.[5] Neither this note nor the government's brief responds to the evidence (Pet. Br. 43) that English and colonial juries frequently found that the accused owned no property despite their knowledge of such property. This evidence demonstrates that in criminal forfeiture cases the jury served its constitutional function of checking government oppression and abuse.[6]

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[5] The only authority the note cites in support of this position is Julius Goebel and T. Raymond Naughton, *Law Enforcement in Colonial New York* (1944). Goebel and Naughton speculated that the requirement of a jury finding of the offender's forfeitable property "was *possibly* intended to simplify the settlement of Crown rights." *Id.* at 711 (emphasis added). They cited no authority in support of this passing comment.

[6] The jury's power to temper the law with its own sense of fairness and justice is an important feature of our constitutional system, with deep roots in English and colonial history. One of the earliest reported examples is *Bushell's Case*, 124 Eng. Rep. 1006 (1670), named after the foreman of the jury that was fined and held in contempt after it acquitted William Penn and William Meade. The court granted Bushell's habeas corpus petition, accepting his contention that jurors could not lawfully be detained merely because their verdict was unacceptable to the

Even if the government could produce some evidence that the jury once served only as a device to facilitate forfeiture by identifying properties to be seized, the metamorphosis of the jury in forfeiture cases would merely parallel its development in other contexts. For example, the original purposes of the grand jury "were to increase the number of criminal prosecutions, to enhance the king's authority, and indirectly to raise revenue for the Crown, which received the property forfeited by persons convicted of crimes." Sara S. Beale and William C. Bryson, *Grand Jury Law and Practice* § 1:02, at 5 (1984) (endnotes omitted).[7] The grand jury's eventual development into an independent institution that won praise as an important safeguard of individual liberty demonstrates that such a lay body, once constituted, may take on functions not originally foreseen.

The ability to resist government oppression is the hallmark of the jury and a primary justification for the jury clause of the Sixth Amendment and the grand jury clause of the Fifth Amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (jury a safeguard against corrupt or overzealous prosecutor and complacent or biased judge); *Wood v. Georgia*, 370 U.S. 375, 390 (1962)

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trial judge. Other well known examples of jury independence during the colonial period were the acquittals of John Peter Zenger (who was represented by Alexander Hamilton) and of the defendants charged in connection with the Boston Tea Party. For a general discussion of jury nullification, see Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239 (1993).

[7] Indeed, some scholars trace the heritage of both the grand and petit jury back to a jury-like body employed by William the Conqueror to compile the Domesday Book, which listed all landowners and showed the value and extent of their holdings. I Frederick Pollack and Frederick Maitland, *The History of English Law* 143 (2d ed. 1923). This appears to be a close corollary of the function attributed by the government to the jury in forfeiture cases.

(grand jury a primary security against hasty, malicious, and oppressive prosecutions). By refusing to identify forfeitable property, common law juries performed this function, and this common law heritage shows that the right to have a jury determine criminal forfeiture is an aspect of the Sixth Amendment right to trial by jury.[8] *Cf. Greene v. Briggs*, 10 F. Cas. 1135, 1142 (C.C.D.R.I. 1852) (No. 5,674) (trial by jury required under state constitution if statute permits criminal forfeiture).

2. The Framers intended to preserve the jury as it existed at common law (Pet. Br. 44-45), where it served as an important safeguard in forfeiture cases. The American colonists recognized the importance of requiring a jury

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[8] The government suggests (U.S. Br. 21 n. 8) that recognition of a Sixth Amendment right to a jury trial of criminal forfeiture would necessarily require that forfeitability be established beyond a reasonable doubt. Yet the decisions cited by the government, *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), and *United States v. Gaudin*, 115 S. Ct. 2310 (1995), had no occasion to address whether forfeiture might be an exception to the general rule that the jury verdict required by the Sixth Amendment is a verdict beyond a reasonable doubt. In any event, recognition of a requirement of proof beyond a reasonable doubt in criminal forfeiture proceedings would impose no undue burden on the government. RICO forfeitures presently require proof beyond a reasonable doubt. *E.g., United States v. Pelullo*, 14 F.3d 881, 901-06 (3d Cir. 1994). CCE forfeitures were originally subject to the requirement of proof beyond a reasonable doubt, though several courts have concluded that legislation enacted in 1984 reduced the government's burden to a preponderance. For a discussion of these cases and an argument that Section 853 did not alter the burden of proof, see 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 14.03 (1992) (since Congress rejected earlier bill to lower burden of proof for criminal forfeiture and enacted other explicit provisions regarding burden of proof, courts have erred in assuming that Congress altered overall burden of proof for criminal forfeiture without any express statutory language or reference to this action in the legislative history).

trial in cases that might lead to civil forfeiture. Parliament extended the jurisdiction of the admiralty courts to cases involving seizures under the trade and navigation acts in response to the nullification of these laws by local juries, and this extension of admiralty jurisdiction led to "vigorous protests in America." 5 J. Moore, *Federal Practice* ¶ 38.35[2] (2d ed. 1995); *see* Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 16 (1960) (most common sanction for violation of trade laws was forfeiture of ships and cargoes). One of the chief complaints of the First Continental Congress was English revenue statutes that "subvert[ed] . . . the right of trial by jury, by substituting in their place trials in Admiralty and Vice-Admiralty courts, where single Judges preside, holding their Commissions during pleasure." 1 Jour. Cong. 93 (Oct. 21, 1774) (message to the inhabitants of the British colonies); *see also Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 322, 331 (1857) (Campbell, J., dissenting) (one of the reasons colonists took up arms was their opposition to "the enlarged authority of [admiralty] courts, their interference with the common law right of trial by jury, and their offensive use of the laws and course of proceeding adopted from Roman tyrants").

The government has advanced no reason to believe that the colonists who protested the absence of a jury in forfeiture proceedings before the admiralty courts would have agreed with the suggestion (U.S. Br. 40) that the right to have criminal forfeiture determined by a jury is not of constitutional importance. There is no merit to the government's suggestion (U.S. Br. 39-40 & n. 15) that the jury's role was constitutionally insignificant because criminal forfeiture was mandatory rather than discretionary. Civil forfeiture also was mandatory. The jury's function was the same in civil and criminal forfeiture cases, and the Framers' actions indicate their understanding that this function was of constitutional magnitude. *Cf. United States v. The Betsey and Charlotte*, 8 U.S. (4 Cranch)

443, 446 n. 1 (1808) (admiralty jurisdiction protected governmental revenues, avoiding "great danger" of "caprice of juries").

3. The decisions holding that the Sixth Amendment does not require the jury to impose the death sentence (U.S. Br. 39-41) have no bearing on this case. The death penalty cases demonstrate only that the contours of the right guaranteed by the Sixth Amendment are determined by history rather than contemporary usage. The statutes giving the jury sentencing authority in death penalty cases are of relatively recent origin. The first statute providing for jury discretion in capital murder cases was enacted by Tennessee in 1838. American Law Institute, *Model Penal Code and Commentaries* § 210.6 commentary, at 129 (1980). Prior to that time, death was the exclusive and mandatory penalty for many crimes. *Id.* The mandatory nature of the death penalty was qualified by the sentencing judge's authority to reprieve the defendant and recommend that he be pardoned. *See* J.M. Beattie, *Crime and the Courts in England 1660-1800* 409, 420 (1986). Since the jury had no similar discretion, it could shield defendants from the death penalty only by finding them not guilty or guilty only of a lesser offense. *See id.* at 406, 408, 419-21.

Accordingly, the death penalty decisions cited by the government do no more than keep the Sixth Amendment within its historic boundaries. The same analysis applies to *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), since there is no historic precedent for requiring the jury to find facts that determine the sentence to be imposed within the range provided for by the offense. *McMillan* and the death penalty cases have no bearing where, as here, the common law required submission of the matter in question to the jury.

4. If this Court concludes that the Sixth Amendment does not protect the right to a jury trial on forfeiture, the government argues (U.S. Br. 44-49) that the right to a special jury verdict under Rule 31(e) is no different than a myriad of other rights that are extinguished by a guilty

plea, even if the defendant is never made aware of those rights. This argument ignores the distinctions drawn by history, by this Court's waiver decisions, and by the text of Rule 11, all of which recognize the fundamental character of the right to a jury determination and demonstrate that any waiver of that right under Rule 31(e) must be knowing and voluntary.

One group of cases relied on by the government (U.S. Br. 46) involves constitutional rights. As this Court explained in *Schneckloth v. Bustamonte*, 412 U.S. 218, 236-37 (1973), the knowing and intelligent waiver standard has not been extended to all constitutional rights, but has generally been restricted to rights required "to protect a fair trial and the reliability of the truth-determining process." The right to trial by jury is one of these rights, and it is waived only by an intentional extinguishment. *See id.* at 237. The cases cited by the government, in contrast, involve constitutional rights, such as the Double Jeopardy Clause and the Fourth Amendment exclusionary rule, which are not essential to the truth-determining process. The same is true of many of the statutory rights cited by the government (U.S. Br. 47-48), such as statutes of limitation, the Speedy Trial Act, and the Interstate Agreement on Detainers; they too are waived by a guilty plea, regardless of the defendant's knowledge.

The right to a jury trial is also readily distinguishable from the other statutory provisions noted by the government (U.S. Br. 47), including the discovery provisions of the Federal Rules of Criminal Procedure, the Jencks Act, and the Federal Rules of Evidence. These modern provisions stand in stark contrast to the right to jury trial, which has been identified as a fundamental right since our nation's founding, and is recognized in the law of every state. Our history as a nation draws a clear distinction between the right to a jury determination and the many other statutory rights of recent origin that are not deemed so fundamental that they require a knowing and intelligent waiver. *See United States v. Robinson*, 8 F.3d 418, 421-22 (7th Cir. 1993).

Equally important, Rule 11 of the Federal Rules of Criminal Procedure provides a clear basis for distinguishing between the various constitutional and statutory rights cited by the government and the right to have criminal forfeiture decided by a jury. In light of the requirements in Fed. R. Crim. P. 11(c)(3) & (4), it is not necessary to reach the Sixth Amendment issue to determine that the knowing and intelligent waiver standard applies.

The plain language of Rule 11(c) requires a knowing and intelligent waiver of the right to a jury determination of forfeiture under Rule 31(e). Rule 11(c) requires the court to "address the defendant personally in open court and inform the defendant of, and determine that the defendant understands" both that he has "the right to be tried by a jury," Fed. R. Crim. P. 11(c)(3), and that "there will not be a further trial *of any kind*" if he pleads guilty, Fed. R. Crim. P. 11(c)(4) (emphasis added). The phrase "trial of any kind" plainly includes the trial leading to the jury verdict required by Rule 31(e). Since Rule 11(c) requires the court to inform the defendant of his rights under Rule 31(e) and to determine whether he intends to waive those rights by pleading guilty, it requires a knowing and intelligent waiver of the right to a jury determination of criminal forfeiture.

Ignoring the plain language, the government advances a crabbed interpretation of Rule 11(c) that limits it to warnings that are found to be constitutionally required. The government argues (U.S. Br. 42) that its interpretation is required by the legislative history, but the legislative report it cites states only that Rule 11(c) was intended to "include" all of the warnings that were constitutionally required. H.R. Rep. No. 247, 94th Cong., 1st Sess. 7 (1975). This mild statement provides no basis for disregarding the express terms of Rule 11(c), including the phrase "trial of any kind."

Since petitioner's claim rests on the historic recognition of the jury's unique importance and the text of Rule 11, there is no basis for the government's concern (U.S.

Br. 49) that acceptance of petitioner's claims would "replace the relative certainty of Rule 11(c) with a free-form inquiry" into what rights should be deemed fundamental. Rule 11(c) itself reflects the fundamental nature of the jury trial right upon which petitioner relies, and the rule itself imposes the requirement of a knowing and intelligent waiver.

5. The government has questioned (U.S. Br. 38 n. 14) what relief petitioner seeks. As stated in petitioner's main brief (Pet. Br. 50), if this Court holds that petitioner has not waived his right to a jury determination on forfeiture, the next step should be a remand to the district court to determine whether petitioner is now willing to make such a waiver. It is not necessary for this Court to reach the question of the relief to be afforded if no waiver can be obtained upon remand, since petitioner may make such a waiver if the parties reach an agreement regarding the scope of the forfeiture.

CONCLUSION

For these reasons, as well as the reasons set forth in petitioner's main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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